Ong Guek Siang & Anor v Asset First Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCVC-796 OF 2011
PRASAD ABRAHAM J
4 JUNE 2012

Civil Procedure — Damages — General damages — Plaintiffs had not prayed for general damages — Whether plaintiffs should be allowed to amend pleadings to claim same

Legal Profession — Solicitor-client relationship — Whether relationship between plaintiffs and second defendant was that of solicitor and client — Liability — Failure to protect plaintiffs' interests — Whether retainer imposed obligation to be skilful and careful upon second defendant — Whether second defendant liable for breach of contract — Whether second defendant in breach of duty of care it owed to plaintiffs — Whether second defendant in breach of fiduciary duty — Whether plaintiffs could recover total amount invested in scheme from second defendant

The first plaintiff decided to participate in an investment scheme ('the scheme') touted by the first defendant to members of the public. Under the scheme the first defendant was to source for auction properties at a guaranteed minimum rate of 25% below market price and facilitate the purchase of such properties for the first plaintiff with the aim of reselling the properties on behalf of the first plaintiff and her nominees at the market price or below. The first plaintiff had appointed her husband ('the second plaintiff') as her nominee for the properties she had intended to purchase. The second defendant was the firm of advocates and solicitors appointed by the plaintiff to act for them in the purchase and resale of the properties by the plaintiffs. The plaintiffs then discovered that the vendors of the properties that were sold to them had no beneficial interest in those properties. The plaintiffs then filed an action for breach against the defendants. By way of this action the plaintiffs sought a sum of RM251,000, which was the total amount invested by the plaintiffs in the scheme, with interest and costs. Judgment in default was entered against the first defendant in the sum of RM251,000. However, the second defendant claimed that it did not owe the plaintiffs a duty of care. It was the second defendant's defence that since the entire scheme was controlled by the first defendant, the plaintiffs' claim if any was only against the first defendant. The plaintiffs argued that the sale and purchase agreements for the auctioned property ('the SPAs') referred to the second defendant as an advocate and solicitor for the transactions. The plaintiffs also adduced evidence to show that

the monies they had paid pursuant to the respective SPAs were paid directly to the second defendant's account. A

Held, allowing the plaintiffs' claim:

(1) Based on the evidence it was clear that the relationship between the plaintiffs and the second defendant was that of solicitor and client. It was not in dispute that the plaintiffs had paid the purchase price in respect of each of the SPAs to the second defendant's client account. In the circumstances, it would be far-fetched for the second defendant to now take the stand that they were not appointed by the plaintiffs. Further, the bills issued by the second defendant charging the plaintiffs interest for the late payment of one of the bills corroborated the relationship of solicitor and client between the plaintiffs and the second defendant (see para 8). B C

(2) The court rejected the second defendant's argument that the SPAs were prepared by the first defendant and that it had merely attested the signature of the parties. The rubber stamp of an advocate and solicitor was an important tool of a solicitor and an affirmation of responsibility. It was certainly not to be used as 'window dressing' and could not detract the second defendant from his responsibilities as a solicitor to the plaintiff in the SPA transactions (see para 10). D E

(3) In contract, the retainer given had imposed upon the second defendant an obligation to be skilful and careful. However, the evidence showed that the second defendant had failed to conduct any searches and also failed to complete the sale and purchase transactions for the plaintiffs. As such, it was found that the second defendant was liable for breach of contract for its failure to protect the plaintiffs' interest (see para 11). F

(4) It was also found that the second defendant had breached the duty of care it owed to the plaintiffs. The second defendant had failed to draw the attention of the plaintiffs to the fact that they had not acquired a beneficial interest to each of the properties it had acquired (see paras 14 & 15). G

(5) The SPAs had imposed an additional fiduciary duty on the second defendant. However, by releasing the balance of the purchase price to the first defendant, the second defendant, stakeholder, had acted in breach of this fiduciary duty (see para 16). H

(6) The plaintiffs could not recover the total amount invested in the scheme, ie the sum of RM251,000, from the second defendant. This was because the plaintiffs had jointly claimed the sum of RM251,000 from both defendants. Although there was no claim for general damages, the plaintiffs were allowed to amend their pleadings to claim the same. This I

court ordered the second defendant to pay the plaintiffs general damages, which was to be assessed, and special damages with interest (see paras 18 & 19).

[Bahasa Malaysia summary

Plaintif pertama telah memutuskan untuk mengambil bahagian dalam skim pelaburan ('skim') yang diuar-uarkan oleh defendan pertama kepada anggota awam. Di bawah skim ini defendan pertama adalah menyalurkan bagi tujuan lelongan hartanah pada kadar minimum yang dijamin sebanyak 25% di bawah harga pasaran dan menyediakan kemudahan pembelian harta tersebut untuk plaintif pertama dengan tujuan penjualan semula hartanah bagi pihak plaintif pertama dan calon-calonnya pada harga pasaran atau lebih rendah. Plaintif pertama telah melantik suaminya ('plaintif kedua') sebagai penama bagi hartanah yang dia bercadang untuk membeli. Defendan kedua adalah firma guaman yang dilantik oleh plaintif untuk bertindak bagi pihak mereka dalam pembelian dan penjualan hartanah oleh pihak plaintif. Plaintif kemudiannya mendapati bahawa penjual hartanah yang telah dijual kepada mereka tidak mempunyai kepentingan benefisial dalam hartanah-hartanah tersebut. Plaintif kemudiannya memfailkan tindakan untuk pelanggaran terhadap defendan. Melalui tindakan ini plaintif meminta wang sebanyak RM251,000, yang merupakan jumlah yang dilaburkan oleh pihak plaintif dalam skim tersebut, dengan faedah dan kos. Penghakiman ingkar dimasukkan terhadap defendan pertama berjumlah RM251,000. Walau bagaimanapun, defendan kedua mendakwa bahawa ia tidak mempunya kewajipan berjaga-jaga ke atas plaintif. Adalah menjadi pembelaan defendan kedua bahawa memandangkan keseluruhan skim telah dikawal oleh defendan pertama, tuntutan plaintif, jika ada, hanya terhadap defendan pertama. Plaintif menghujahkan bahawa perjanjian jual beli bagi hartanah yang dilelong ('SPA') merujuk kepada defendan kedua sebagai seorang peguambela dan peguamcara untuk transaksi tersebut. Plaintif juga mengemukakan bukti yang menunjukkan bahawa wang mereka telah dibayar mengikut SPA masing-masing, terus ke akaun defendan kedua.

Diputuskan, membenarkan tuntutan plaintif:

(1) Berdasarkan bukti, adalah jelas bahawa hubungan antara plaintif dan defendan kedua adalah peguamcara dan klien. Tidak dipertikaikan bahawa plaintif telah membayar harga belian bagi setiap SPA ke akaun pelanggan defendan kedua. Dalam keadaan ini, defendan kedua tidak boleh mengatakan bahawa mereka tidak dilantik oleh plaintif. Tambahan lagi, bil yang dikeluarkan oleh defendan kedua mengenakan faedah ke atas plaintif bagi pembayaran lewat salah satu daripada bil yang disokong oleh hubungan peguamcara dan klien antara plaintif dan defendan kedua (lihat perenggan 8).

(2) Mahkamah menolak hujah defendan kedua bahawa SPA telah

disediakan oleh defendan pertama dan bahawa ia hanya mengesahkan tandatangan pihak-pihak. Setem peguambela dan peguamcara adalah satu alat yang penting sebagai pengesahan ikrar tanggungjawab. Ia sudah tentu tidak akan digunakan sebagai 'window dressing' dan tidak dapat melepaskan defendan kedua daripada tanggungjawabnya sebagai peguam kepada plaintif dalam transaksi SPA (lihat perenggan 10).

(3) Dalam kontrak, *retainer* yang diberikan telah mengenakan ke atas defendan kedua kewajipan untuk menjadi mahir dan berhati-hati. Walau bagaimanapun, bukti menunjukkan bahawa defendan kedua telah gagal untuk menjalankan apa-apa carian dan juga gagal untuk melengkapkan transaksi penjualan dan pembelian bagi plaintif. Oleh itu, didapati bahawa defendan kedua adalah bertanggungan bagi pelanggaran kontrak atas kegagalan untuk melindungi kepentingan plaintif (lihat perenggan 11).

(4) Ia juga didapati bahawa defendan kedua telah melanggar kewajipan berjaga-jaga ke atas plaintif. Defendan kedua telah gagal untuk menarik perhatian pihak plaintif kepada fakta bahawa mereka tidak memperoleh kepentingan benefisial kepada setiap hartanah yang diperolehi (lihat perenggan 14 & 15).

(5) SPA telah mengenakan kewajipan fidusiari tambahan ke atas defendan kedua. Walau bagaimanapun, dengan memberikan baki harga belian kepada defendan pertama, defendan kedua, pihak berkepentingan, telah bertindak melanggar kewajipan fidusiari ini (lihat perenggan 16).

(6) Plaintif tidak boleh mendapatkan semula jumlah yang dilaburkan di dalam skim ini, iaitu jumlah sebanyak RM251,000 daripada defendan kedua. Ini adalah kerana plaintif telah bersama-sama menuntut sejumlah RM251,000 daripada kedua-dua defendan. Walaupun tidak ada tuntutan untuk ganti rugi am, plaintif telah dibenarkan untuk meminda pliding mereka untuk menuntut yang sama. Mahkamah ini mengarahkan defendan kedua untuk membayar plaintif ganti rugi am, yang akan ditaksir, dan ganti rugi khas dengan faedah (lihat perenggan 18 & 19).]

Notes

For cases on general damages, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2500–2505.

For cases on solicitor-client relationship, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2037–2040.

Cases referred to

GT Rajan v Lee Yoke Lay & Anor [1994] 2 MLJ 315, HC (refd)

Guinness Anchor Marketing Sdn Bhd v Chellam Joe Vetha Thya Singh [1999] MLJU 88; [1999] 7 CLJ 392, HC (folld)

Groom v Crocker [1939] KB 194, CA (refd)
Loh Bee Tuan v Shing Yin Construction (Kota Kinabalu) Sdn Bhd & Ors [2002] 2 MLJ 532, HC (refd)
Yong & Co v Wee Hood Teck Development Corporation reported in [1984] 2 MLJ 39, FC (refd)

Legislation referred to

National Land Code
Solicitor's Remuneration Order 1980

CH Choo (James Selva and Christie Seosay Nathan with him) (CC Choo, Hazila & Teong) for the plaintiff.
Jane Pragasam (Marianne Paul with him) (Ho Noecker & Pragasam) for the defendant.

Prasad Abraham J:

[1] The trial of this matter was disposed of on 2 March 2012 and the court delivered judgment on the matter on 21 May 2012 wherein the court made the following orders ie:

(a) OIT of prayer (b), (c), (d), (e) of the statement of claim;

(b) interest as per prayer (c) to run on the sum mentioned in prayer (b); and

(c) invoking the inherent powers of the court, damages to be accessed by the *timbalan pendaftar* of this court.

[2] As the matter raised several issues of importance involving the role of solicitors in conveyancing transactions I now append my grounds of judgment for so deciding.

[3] The salient facts of the case are not seriously in dispute and are well set out in the respective written submission of both parties. The facts are set out as follows:

(a) the plaintiff are husband and wife;

(b) the first plaintiff entered into an agreement dated 19 June 2009 (the 'asset first agreement') with the first defendant (pp 1–3 of bundle B1);

(c) the defendant is a private limited company and pursuant to cl 12 of the asset first agreement the first defendant was to 'source or obtain for the resident ('the first plaintiff') properties at a guaranteed minimum rate of 25% below market price;

(d) pursuant to cl 2 of the asset first agreement, the first defendant had been appointed to facilitate the purchase and resale of properties by the first plaintiff and her nominees;

(e) pursuant to cll 2 and 7 of the asset first agreement, the first plaintiff appointed the second plaintiff as her nominee for the properties she had intended to purchase;

(f) the second defendant was a firm of advocates and solicitors who were appointed by the plaintiff (which is denied by the second defendant to act for them in the purchase and resale transactions of the properties referred to in the plaintiffs' action herein; and

(g) judgment in default was entered against the first defendant on 29 September 2011.

THE ISSUES FOR CONSIDERATION

[4] Did the second defendant act as solicitor for the plaintiff at all material times and as such did the second defendant owe a contractual duty to the plaintiffs and a duty of care in tort an alleged breach of which the plaintiffs claim for damages. Judgment has been entered against the first defendant for RM251,000 ie the total investment of the plaintiffs in the scheme.

[5] In dealing with the issues in this case the court must look at the scheme itself that was being proposed. In essence the first defendant was touting to members of the public that the essence of the investment scheme was the first defendant would facilitate the purchase of auction properties at a minimum rate of 25% below market price and thereafter resold at market price or above ('the said scheme'). The entire operation of the said scheme was controlled by the first defendant including the choice of properties and solicitors, one of whom was the second defendant. The plaintiff attended briefings on the same and thereafter paid RM15,750 to the first defendant as joining fees. The evidence shows the plaintiff attended briefings conducted by the first defendant on the scheme and decided to participate.

[6] This scheme appears to have been well packaged and pitched to the public because it involved auction properties. The court can only assume that the properties in question were properties without title otherwise if they had title, the rigours of the provision of the National Land Code would have prevented the said scheme from being implemented. The said scheme to my mind was tailored to plug at the heartstrings of the average Malaysian investor ie the sale and resale of property at a profit within a short turnaround time. It is my observation, that the plaintiffs went into the said scheme with their eyes open (not that they should be faulted for the same in anyway).

[7] With the discovery that in the sale purchase agreements referred to earlier, the vendors had no beneficial interest in each of the properties to enable them to be resold for a profit, what was the position of the second defendant vis vie the plaintiff. The second defendant claims that he never was the advocate and solicitor appointed by the plaintiffs nor did he owe them a duty of care and their claim if any was against the first defendant. This despite the fact the evidence clearly shows the monies paid by the plaintiffs pursuant to the respective sale and purchase agreements were paid directly to the second defendant's account (see bundle B1 pp 53–66). The second defendant appears to take the stand that they were appointed by the first defendant and the second defendant was a piece in the facade of sale and purchase agreements to put in to effect the said scheme.

[8] The court refers to bundle B1 pp 5–14 ie one of the sale and purchase agreement where the plaintiff was a purchaser. At p 5 the second defendant is described as an advocate and solicitor for the transaction (see also p 14 item 9). Turning to p 15 ie the bill issued by the second defendant, to the plaintiffs was for legal charges that were being charged by the second defendant for 'completing the matter' and completing the matter would mean the assignment of the beneficial interest of that property to the plaintiff which was not done. To my mind it is clear that the relationship between the plaintiff and second defendant was that of solicitor and client. Monies were paid to the account of the second defendant pursuant to that transaction and to now take the stand that they were not appointed by the plaintiff is rather farfetched to say the least. I refer to one of the bills issued by the second defendant (see B1 p 16) at the bottom where the second defendant had given notice of the charging of interest for late payment of the said bill pursuant to item 6 of the Solicitors' Remuneration Order 1980. This letter corroborates the relationship of solicitor and client between the plaintiff and the second defendant. I refer to the decision of the Federal Court in *Yong & Co v Wee Hood Teck Development Corporation reported in* [1984] 2 MLJ 39 where the Federal Court held:

> (1) There was ample evidence on the record for the learned judge to conclude that a retainer came into existence by implication and as amplified by the conduct of the parties *which showed a course of dealings giving rise to legal obligations and establishing the relationship of solicitor and client between the appellants and the respondents. There was therefore a retainer which put into operation the normal terms of the contractual relationship including in particular the duty of the appellants as solicitors to protect the interest of the respondents as their client in matters to which the retainer relates by all proper means.*

[9] The position is the same with the other three agreements and it is not in dispute that the plaintiffs had paid the purchase price in respect of each of sale and purchase agreements into the second defendant's client's account.

[10] The second defendant contends the sale and purchase agreements were prepared by the in house legal department of the first defendant who did the needful in terms of searches and all the second defendant did was to attest the signature of the parties. The court rejects that argument. The rubber stamp of an advocate and solicitor is an important tool of a solicitor and is an affirmation of responsibility. It is certainly not to be used as 'window dressing', and whatever may have been agreed in the investment agreement cannot detract the second defendant from his responsibilities as a solicitor to the plaintiff in the transactions referred to aforesaid.

[11] Having found there existed a relationship of solicitor and client between the plaintiffs and the second defendant what are duties in law owed by the second defendant to the plaintiff. The second defendant owed concurrent duties in contract and tort. In contract, the retainer imposes upon the second defendant an obligation to be skillful and careful, for failure to fulfill this obligation, the second defendant may be held liable for breach of contract (see *Cordery's on Solicitors*, (7th Ed), Graham J Graham-Green, p 150 to p 151), and I quote:

> To Be Skilful and Careful
>
> At common law a solicitor contracts to be skilful and careful, for a professional man gives an implied undertaking to bring to the exercise of his profession a reasonable degree of care and skill. It follows that this undertaking is not fulfilled by a solicitor who either does not possess the requisite skill or does not exercise it It is immaterial whether the solicitor is retained for reward or volunteers his services, or whether or not he has a practising certificate in force at the time.
>
> A solicitor's duty is to use reasonable care and skill in giving such advice and taking such action as the facts of the particular case demand. The standard of care is that of the reasonably competent solicitor, and the duty is directly related to the confines of the retainer.

[12] The second defendant never conducted any searches, nor does the evidence show that the second defendant took any steps to complete each of the said transactions but left it all to the first defendant. I find the second defendant liable for breach of contract. The learned author Cordery further states and I quote:

> To Protect the Client's Interest
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> The exact scope of the solicitor's duty to protect his client's interest is difficult to define, but according to Scott LJ, a solicitor should at least

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(a) Carry out his instructions in the matters to which the retainer relates, by all proper means;

(b) Consult with the client on all questions of doubt which do not fall within the express or implied discretion left to him; and

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(c) Keep his client informed to such an extent as may be reasonably necessary.

[13] I see also make reference to the case of *Groom v Crocker* reported in [1939] KB 194 and to the judgment of Scott LJ at p 222 and I quote:

C

> The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. The retainer when given puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest and carry out his instructions in the matters in which the retainer relates, by all proper means. It is an incident of

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> that duty that the solicitor should consult with his client in all questions of doubt which do not fall within the express or implied discretion left him, and should keep the client informed to such an extent as may be reasonable necessary according to the same criteria. But in all the these aspects the tie between the two is contractual.

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[14] I also find the second defendant had breached its duty of care it owed to the plaintiffs and this has caused the plaintiffs to be in jeopordady as none of the said properties and the beneficial interest to it had been registered in the name of the plaintiffs.

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[15] The second defendant should have drawn the attention of the plaintiffs to the fact that they had not acquired beneficial interest to each of the properties as evidence was led that vendors after all were members of the said scheme and in fact so was the second defendant. However there was no

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evidence led as to what steps the second defendant had taken in this regard. Even as late as when the plaintiffs had appointed their own solicitors to act for them, the second defendant did not respond (see bundle B1 pp 67–70). I refer to the case of *Loh Bee Tuan v Shing Yin Construction (Kota Kinabalu) Sdn Bhd & Ors* [2002] 2 MLJ 532 where His Lordship Justice Charles Ho held:

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(3) In the instant case, a duty of care arose as the fourth defendant knew that the plaintiff was unrepresented and that the transaction was fraught with risks to the plaintiff as the property was heavily charged. The fourth defendant should have advised the plaintiff to get another solicitor or at the very least explained the risks involved as the property was encumbered

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(see pp 550H–551A).

(4) The fourth defendant had breached the duty of care and skill ordinarily required of a solicitor in his position. If he was only acting for the developer, he failed to advise the plaintiff of the fact. He failed to inform her that the master title was heavily encumbered with five charges and that

the representation in the sale and purchase agreement that the title was clean was patently false. The fourth defendant proceeded to act for the developer and end financier without any regard whatsoever for the interest of the plaintiff (see p 548F-H).

[16] Apart from the second defendant having breached his contractual obligations to the plaintiffs by virtue of his retainer and the duty of care owed by him. I observe there is an additional duty imposed on the second defendants by the sale and purchase agreements. It is clear that the second defendant acted in addition to his role as solicitor for the plaintiffs, acted also as a stakeholder and in breach of the terms of the stake had released the balance of the purchase price to the first defendant (see cll 4–5 of the sale purchase agreement p 7 bundle B1).

[17] There was a breach of fiduciary duty on the part of the second defendant from which the second defendant was liable. I refer to the decision of the High Court sitting on appeal from the disciplinary board in *GT Rajan v Lee Yoke Lay & Anor* [1994] 2 MLJ 315 where it was held, allowing the appeal:

(1) It is without doubt that Rajan first acted as a solicitor for the respondents. In that capacity, he was an agent of the respondents. However, when the agreement was executed, Rajan's role as an agent was transformed. The provision that Rajan shall receive the balance purchase price and not release the same until the registration of the transfer in the names of the purchasers or their nominees placed a responsibility on Rajan to keep the money in his own hands or to put it on deposit with a bank. In the event that registration of the transfer could not be registered, he had to return the money to the purchasers. On the other hand, without the money being placed with him, the respondents would have refused to allow the release of the document of title and the memorandum of transfer to the purchasers. Rajan was therefore placed in the position of a trustee where he was accountable to both the purchasers and the respondents and in order to protect both their interests, Rajan was clearly a stakeholder.

[18] Looking at the plaintiffs claim appearing in bundle A and the prayers sought the plaintiff sought prayer (a) a sum of RM251,000 ie the total amount invested in the scheme by the plaintiffs and judgment for that amount had been entered against the first defendant. The claim against the first and second defendant is joint and I am in full agreement with the judgment of Dato' Hj Abdul Malik Ishak J as he then was when he said in the case of *Guinness Anchor Marketing Sdn Bhd v Chellam Joe Vetha Thya Singh* [1999] MLJU 88; [1999] 7 CLJ 392 NB p 411, and I quote:

A The correct statement of the law may be stated as follows. Whenever there is a joint liability or an alternative liability is concerned with, the judgment against one will prevent the instituting of fresh proceedings against the other in the case of joint liability, and likewise the judgment against one will prevent the further proceedings against the other or the instituting of fresh proceedings against the other in the case of alternative liability.
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[19] The plaintiffs cannot enter judgment for the said sum of RM251,000 which is jointly claimed against both defendants as judgment has already been entered against the first defendant. There is no prayer for general damages
C against the second defendant and I pointed it out to counsel for the second defendant (see *Law of Torts in Malaysia*, (3rd Ed), Norchaya Talib at p 448), and I quote:

Restitutio in integrum

D The general rule is that damages *are to be assessed on a compensatory basis, which is to restore the Plaintiff to his position prior to the commission of the tort.* This is known as the principle of restitutio in integrum.

In *Livingstone v Rawyards Coal Co*, it was held that restitutio in integrum is that sum
E of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

The amount of damages to be awarded must be reasonable, reasonable that is as between the plaintiff on the one hand and the defendant on the other.
F Consideration ought to be given to a variety of matters such as the nature of the property, the plaintiff's relation to it, the nature of the wrongful act causing the damage, the conduct of the parties subsequent to the wrongful act, and the pecuniary or other relevant implications or consequences of reinstatement damages as compared with diminished value damages. The intention of the tortfeasor is also taken into account.
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[20] The plaintiffs then orally applied to amend its pleadings to include a prayer for general damages which I allowed and I directed general damages to be assessed by the *timbalan pendaftar*. I allowed prayer (b) of the statement of
H claim (bundle A p 72) as the amount constituted special damages.

[21] It is for the aforesaid reasons that I allowed judgment for the plaintiff as ordered.

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Plaintiff's claim allowed.

Reported by Kohila Nesan